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CURRENT TOPICS.

In *Richardson v. Hughitt*, recently decided by the Court of Appeals of New York, a contract providing for the loan of a sum of money, and giving a portion of the profits to the lender, was held not to constitute a partnership. The facts are seen in the opinion of the court by MILLER, J.:

"The facts in this case are uncontradicted; and the question to be determined is, whether Hughitt had such an interest in the profits of the business of Bench Bros. & Co., as to render him liable jointly as a partner with the other defendants to third parties. Hughitt was to advance money upon the wagons manufactured upon the terms provided for in the contract, and with the single exception of the provision made therein, that Bench Bros. & Co. were to pay one-fourth of the net profits upon the sales of wagons, with interest on the advances made at five and one quarter per cent., so far as the cash received would go, and the balance in notes on interest at seven per cent. There is no question, I think, that the contract between the parties related to a loan of money alone upon the terms stated therein. Nor am I prepared to assent to the proposition, that this portion of the agreement, considering the facts connected with it, and the terms employed in the same, created a partnership between the contracting parties. The true construction of the instrument evidently is, that it was a contract between the lender and the borrower; and the provision made as to the profits were merely a mode of providing a compensation to Hughitt for the use of the money which he had advanced; and the share of the profits which Hughitt was entitled to receive was not as partner, but on account of the debt owing to him by the firm of Bench Bros. & Co."

The general rule is that, to constitute a partnership, there must be a community of interests *inter se*, and that the parties should share the profits and losses. Pattison v. Blanchard, 1 Seld. 186. This, however, is not without exception, and where there is an agreement for sharing in the profits of a business, in some cases it is sufficient to establish a partnership as to third persons. See Manhattan Brass M'f'g Co. v. Sears, 45 N. Y. 797. And here comes in another exception to the rule last stated, which is, that where the person had no interest in the capital or business, and is to be remunerated for his services by a compensation from the profits, or measured by the profits, or what is to depend, as in the case of seamen or other voyagers, upon the result. it has no application. Where, then, one is only interested in the profits of a business as a means of compensation for services rendered, he is not a partner. Leggett v. Hyde, 58 N. Y. 272, 280; Smith v. Bodine, MSS. of May, 1878; Vanderburgh v. Hull, 20 Wend. 70; Burckle v. Eckhart, 1 Denio, 337; on appeal, 3 Comst. 132; Fitch v. Hall, 25 Barb. 13; Lamb v. Grover, 47 Id. 317; Smith's L. C, 5th Am. ed., 272. These cases fully sustain the doctrine laid down in the principal case, that where the profits are the measure of compensation no partnership is created.

THE doctrine that a bill of lading, though a contract as to most of its terms, is but a receipt as to others, is illustrated by the recent case of *Archer v. The Adriatic*, decided by Mr. Chief Justice WAITE in the United States Circuit Court for the Southern District of New York, in June last. The action was for the damage to a cargo of fifty bales of yarn, caused by sea water. The bill of lading signed by the agent of the ship at Liverpool, receipted for the bales in the usual form, as shipped "in good order and well conditioned." The goods were described as 250 bales of coir yarn "in transit" from steamer Macedonia, and were to be delivered in like good order and well conditioned. The bill of lading also contained this clause: "Weight, contents, quality, condition, quantity and value unknown, and ship owner not accountable for the same." At the time of the shipment the bales were apparently in good external order and condition. The ship arrived in New York, October 30th. When the bales were landed in New York, 100 were found to have been wet at some time with sea water; on cutting the wrappers and examining the yarn it was found to be damp, and unfit for the manufacture of fine goods, to which it was on account of its quality originally adapted. No other goods came out of the vessel wet; there was nothing in the appearance of the yarn to indicate that the wetting might not have occurred before the delivery to the Adriatic. WAITE, C. J., said: "The receipt of the bill of lading is an admission that the goods were, when received, in apparent good order; but it is not conclusive as to their actual condition. It makes a *prima facie* case against the ship, and gives the libellants a right to recover unless this case is overcome by the evidence. The burden of the admission rests

upon the ship until it is shown that the appearance and condition of the goods at the time of their discharge are consistent with the actual existence in the packages of the cause of the damage when the shipment was made, without discovery by the ship's agents, acting in good faith and with ordinary care, while taking the cargo on board. There is here no question of estoppel. The bill of lading had not been assigned, and it does not appear that any advances have been made on the faith of it. The evidence is, as I think, sufficient to shift the burden of proof from the ship to the libellants. The goods were received while in transit, and from another ship. They might have been exposed to sea water while on their way to Liverpool, and still the damage be such as not necessarily to attract attention as the transfer was made from ship to ship. It was only about ten days from the time of the shipment in Liverpool to the discharge in New York. When the bales were discharged, there was no appearance of recent exposure; the wrappers were discolored, and the yarn was damp; no other goods were wet, and there was no appearance of any leak in the ship. There was no water to be seen in the hold where the goods were stowed, and none of the other cargo appears ts have been damp even. Under these circumstances it seems to me clear that the libellants, before they can recover, must prove that their yarn was actually free from wet or dampness when it went on board. The damaged appearance of the yarn when it came out is a circumstance to be taken into consideration in their favor, but it is not of itself sufficient, as it seems to me, to overcome the effect of the other facts which are clearly established by the evidence."

This ruling is sustained by the authorities, though none are cited by the chief justice. The admission in the bill of lading that the goods were received "in good order and condition," refers only to their external condition: The Olbers, 3 Ben. 148 (1869); Vaughan v. 630 Casks, 7 Ben. 506 (1874). Thus the receipt for bales of cotton "in good order and well conditioned," does not warrant the internal quality or condition of the cotton in the bales. Bradstreet v. Heran, 2 Blatchf. 117 (1849). And the clause "shipped in apparent good order and condition, five cases of merchandise," was held an admission only that the cases contained merchandise, and were outwardly sound. Abb. on Ship. 339; The California, 2 Sawy. 12 (1871). But where a bill of lading was given for a box of marble tops, "in good order and well conditioned," it was held that the burden of proof was upon the carrier to show that the marble was broken when it came into his hands; for here there was the carrier's admission that the specified articles were in the box and in good order. Price v. Powell, 3 N. Y. 322 (1850). The word "apparent," inserted before the word "good," does not change its legal effect. The Oriflamme, 1 Sawy. 176 (1870); and see Carson v. Harris, 4 G. Greene, 516 (1854); Mitchell v. United States Express Co., 46 Ia. 214 (1877); West v. The Berlin, 3 Ia. 532 (1856); The Freedom, L. R. 3 P. C. 594 (1871).

PRINCIPAL AND ACCESSARY.

II.

Incomplete execution. Geyer (Holtzendorff, Strafr. II, 345) gives the following enumeration of cases in which the offence is to be regarded as incomplete:

1. The instigator may fail in inducing the intended perpetrator to act. This includes cases in which the agent agrees to commit the crime, but does so merely as a blind, or from fear, without any intention of executing his purpose.

2. The agent really intends to execute the crime, but is prevented, even before the intention ripens into an attempt.

3. The instigator hits upon an agent who had already determined to commit the crime, and who cannot be said to be "instigated" to an act which he had already fully determined to commit. In this case the instigator is not responsible, unless it appear that his influence went to strengthen the agent in his criminal purpose.

Backing out of Instigator and of Perpetrator. Suppose that the instigator backs out before the crime is perpetrated, does he thereby relieve himself from criminality?—If, when withdrawing, he not merely expresses his disapproval of the crime, but takes all the measures in his power to prevent its consummation, and such measures fail because of *casus*, or some

new intermediate impulse, then his criminality ceases. But it does not cease simply because, after starting the ball, he changes his mind, and tries, when too late, to stop it. To emancipate him from the consequences, not only must he have acted in time, and done everything practicable to prevent the consummation, but the consummation, if it takes place, must be imputable to some independent cause. On the other hand, it is plain that when the perpetrator changes his mind, after having gone as far as an attempt, and abandons a further prosecution of the design, he is indictable for the attempt. It has been argued that if the frustration of the attempt is due to his interposition, consequent upon his repentance, he is relieved from all prosecution. But it is hard to see how his repentance, *subsequent* to the attempt, can cancel his responsibility for the guilt of the attempt; though it would be otherwise if he intervened prior to the attempt.

Combination of Instigators. Cases frequently occur in which two or more instigators co-operate in procuring one or more agents to act in the perpetration of a crime. Such cases may be classified as follows (see Holtz., Strafr. II, 377): 1. The instigators may act concurrently with the perpetrator. In such case the ordinary law of conspiracy applies. The parties must be intentional participants in a common unlawful design. It is not enough that they are casual, incidental, co-operators. To charge a party with an intentional co-operation, he must know that the others are working with him for the same criminal purpose, and he must contribute something to the common effort. If this is not done, he cannot be regarded as an instigator, or accessary before the fact. 2. Instigation may not be concurrent, but successive. In other words, A may instigate B to instigate C. In such case, supposing the causal relation be established, and C is really induced to act by A, through B's agency, A is as much responsible as if he induced C to act by letter.

Modes of Instigation. "Procure" is the first term used in the ordinary definition of our old accessaryship before the fact. The most obvious mode of procuring is by hiring. The instigator takes the agent into his service, and engages him for a reward to commit the proposed crime. The "procuring," however, must be *before* the act. It has been much discussed whether promising a reward to a person already resolved on the act constitutes an instigation. But the better opinion is that it does in cases where the perpetrator is strengthened in his purpose by the reward.

"Counselling," to come up to the definition, must be special. Mere general counsel, for instance, that all property should be regarded as held in common, will not constitute the party offering it accessary before the fact to a larceny; "free-love" publications will not constitute their authors technical parties to sexual offences which these publications may have stimulated. Several youthful highway robbers have said that they were led into crime by reading Jack Shepherd; but the author of Jack Shepherd was not an accessary before the fact to the robberies to which he thus added an impulse. Under the head of "counsel" may be included advice and instruction as to the modes of committing particular crimes, *e. g.* pocket-picking. *General* instruction, it is true, could not be "counselling" in the sense before us; though it is otherwise with special instructions as to the management of a particular case.—*Persuading* and *tempting* to a particular crime falls under this head. The modes in which this kind of counselling may be manifested are numerous. The counsel need not be exclusively in words. It may consist, at least in part, (*e. g.* Faust and Mephistopheles,) in the exhibition of some object of desire. It is possible, also, to conceive of cases in which there is no immediate communication between the seducer and the seduced. Third persons may be used as innocent or compulsory go-betweens.

"Command" is a term borrowed from the Roman *mandatum*, which is frequently used in this connection. Viewing the term nakedly, it describes few cases of accessaryship. Men are rarely to be found who would commit a crime because "commanded" to by another, unless they are under special obligations to such other. Among such obligations we may primarily notice that of wife to husband, which the law recognizes in some cases as a defence to the wife when on trial. Next to this may be enumerated the obligation of child to

parent, of servant to master, of subordinate to superior. These obligations do not constitute a legal excuse unless the perpetrator acts under compulsion,—*vis compulsiva*,—or unless the command generates in him an error of fact which induces him to regard the act as innocent. Military command, also, may be an excuse to the subaltern, when he acts *bona fide* under the command, and not in satisfaction of any special private malice of his own. A police officer is in the same way protected, provided he acts within the range of his office, and executes what he believes to be an official duty for a public end. It is otherwise when he knowingly executes a command issued for extortionate or other unlawful purposes. A command, it may be added, need not be in *words*. It may be in *signs*. (See Holtzen. Strafr. II, 353.)

"Advising" may be by a process of deception, by a misrepresentation of facts. A. contrives to induce B to believe he has received an injury from C, which it is B's duty to avenge by taking C's life. Supposing A to act in this way with the malicious purpose of killing C by the agency of B, A is guilty at common law as accessary before the fact, or, under our recent statutes, as principal.

Relation of Instigator's Grade of Guilt to that of Perpetrator. It by no means follows that the grade of guilt which attaches to the instigator is transferred to the perpetrator.—Under the old Roman law, a homicide by a blood relation was treated as peculiarly heinous; but while the instigator, he being a blood relation of the class designated, was guilty of this high offence, the tool whom he employed to effect his purpose was guilty only of an ordinary homicide. A high official, who instigates an act which makes him guilty of misconduct in office, does not impart this special character of criminality to the agents whom he engages in the execution of his plan.

Relation of Perpetrator's Grade of Guilt to that of Instigator. If the perpetrator is irresponsible, the instigator, as we have already seen, is to be treated as principal. The perpetrator is but a machine in the principal's hands, and what the instigator does, is assumed to be the act of the principal. Necessity has the same effect in conferring irresponsibility; while he who unnecessarily puts another in a position in which he must commit crime, is the principal in such crime.

2. Personal relations of the perpetrator to the deceased do not affect the grade of guilt of the instigator.

3. It is otherwise as to the effect of passion when malice is at issue. The instigator may act in hot blood, in which case he will be only guilty of manslaughter, while the perpetrator may act coolly, and thus be guilty of murder. The converse, also, may be true; the instigation may be in hot blood, the execution in cold blood.

When the perpetrator's grade of crime depends upon his personal relations in order to charge the instigator with the same grade of crime, it is necessary that he should have knowledge of these personal relations. To be instigator to incest, for instance, it is necessary that there should be a knowledge of the relationship which constitutes the gist of the crime. The same rule exists with regard to misconduct in office. To constitute accessaryship in such cases it is necessary that there should be a knowledge of the official relation.

Statute of Limitations as a Defence. Considerable difficulty may arise when the statute of limitation is set up in cases where it would bar a prosecution against the instigator if the instigation is to be regarded as an independent crime. But ordinarily instigation is no more an independent crime than is the first preparation for an offence, which preparation may for years precede the overt act. The instigation is to be received as part of the crime, and unless the statute protects the perpetrator from prosecution (the statute running from the act of perpetration), it does not protect the instigator. He may have started the impulse years ago, so as to protect him under the statute, had the crime been then perpetrated; yet if he started the impulse as something that was to be continuous, and it did continue, and finally operated inside of the statute, the statute does not protect him. But the impulse must have acted continuously, in order to make him in this way responsible. A man who hired an outlaw last month to perpetrate a crime, which crime is abandoned, is not responsible if the same crime is subsequently committed by the same agent, under the auspices of another employer.

Assistants. Characteristics of. To make a party liable as assistant (or principal in the second degree), it is necessary that

1. The assistance should be intentional. No one can be charged with *negligently* assisting another. It is true that a person intervening when another is committing an intentional crime may do a negligent injury, and may, therefore, be indictable for negligence. But this is not assisting, since assistance implies intelligent co-operation.

2. The person who is assisted (the principal in the first degree) must be acting at the time maliciously, intending to effect the criminal end to which he is assisted. Hence there can be no assistance, or principalship in the second degree, to a negligent offence. The principal in the first degree, also, must be a responsible person. If he be insane, or idiotic, or acting under coercion, the person acting through him is principal in the first degree.

Relations of Instigator to Principal. The assistant (principal in the second degree) is distinguished from the principal in the first degree in this, that the latter *directs* the unlawful act, the former *assists* it,—the action of the latter is primary, that of the former is subsidiary. Hence the principal in the first degree is spoken of by the old writers as *causa principalis*, while the principal in the second degree is spoken of as *causa secundaria*, or secondary cause. On the other hand, the accessary before the fact, or instigator, acts deliberately, and so, though with premeditation it may be not so cool and long, does the principal in the first degree; while the idea of such extended premeditation is not necessary to the principal in the second degree, or assistant, who is not supposed, as is the instigator, to exercise an organizing influence on the principal in the first degree, and who may be employed or induced to assist the latter without any previous conception of what the criminal act is intended to be. It is, of course, possible for a person to be at once instigator and assistant in the perpetration of a particular crime. But ordinarily the action of the assistant is subordinate to that of the principal. He is present at the perpetration, but present only as an auxiliary, The distinction, however, under our present modes of pleading is one that goes only to the adjustment of punishment. So far as concerns the offence itself, the grade of the assistant, unless peculiar conditions of passion are shown, is that of the principal. Should, however, it appear that the principal acted deliberately and the assistant in hot blood, the latter would be chargeable with the minor, the former with the major offence. The converse, also, is supposable, that the principal acted in hot blood, and the assistant, seizing the opportunity of a collision to wreak private spite, intervened maliciously.

Different Kinds of Assistance: 1. *Positive and Negative.* As to the first there is no question. As to the second, it may be observed, that merely witnessing a crime, without intervention, does not make a person a party to its commission, unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime. A person, for instance, in order to produce a collision on a railroad, starts a car on the top of a high grade. A switch-tender, appointed to watch and adjust a particular switch, could avoid a collision by turning the switch, but intentionally refuses to do so. In such case he is an assistant to the homicide, if a homicide ensue. A watchman appointed to guard a bank sees burglars approach, and lets them pursue their work without interruption. By so doing he becomes assistant in the felony. But unless this abstention from interference removes a check which would otherwise prevent the commission of the crime, and is therefore equivalent to a positive act of assistance, the party so abstaining does not become a party to the crime. He may be indicted for his neglect in not assisting the officers of the law in arresting the offenders. But he is not indictable as concerned in the offence which the offender in question commits.

2. *Physical and Intellectual.* A distinction is taken between physical and intellectual help, the latter being supposed to be help purely in words, or signs of encouragement. It should be observed, however, that all physical help is intellectual. A participant in a fight, for instance, to take an extreme case, sees a weapon shown to him by a person who is invisible. Here is physical aid in its most naked shape, since the person offering the aid is not even

seen. Bnt it is at the same time intellectual, (or psychical, to take the German term,) aid, since it gives the combatant reason to believe that he has a friend near ready to see him through. It is encouragement as well as assistance. F. W.

CIVIL RIGHTS—COMMON CARRIERS—REASONABLE REGULATIONS.

GREEN v. THE CITY OF BRIDGETON.

United States District Court, District of Georgia, May, 1879.

1. CIVIL RIGHTS — RIGHT OF COMMON CARRIERS TO PRESCRIBE REGULATIONS.—Congress has enacted no law which forbids inter-State common carriers by water or land from regulating the business of their vessels or vehicles in such manner that the accommodations for colored passengers on their respective conveyances may be distinct and separate from those assigned to white passengers. Colored persons are, however, entitled to accommodations as suitable as those designated for the exclusive use of white passengers.

2. CASE IN JUDGMENT. —The libellant, a colored woman, went on board a steamboat and took her position as a passenger on the upper deck aft, a portion of the boat assigned to the exclusive use of white passengers. She was directed by one of the officers of the boat to the cabin on the lower deck, a place affording substantially the same accommodations as the place where she now was, but designed especially for colored people. She refused to do so, and tendered the customary fare, which was declined. Having been threatened that she would be put off the boat at the next landing place if she persisted in remaining where she was, she voluntarily left the boat at such landing place. *Held*, that she had no cause of action for such exclusion.

ERSKINE, J.:

The libellant states that the steamboat, City of Bridgeton, in September, 1878, the time of the alleged tort, was a common carrier of freight and passengers for hire, at certain specified rates, between the city of Savannah and Palatka, in the State of Florida, and intermediate points, including the port of Darien, in this district; that said steamboat being at the wharf of Darien, and libellant desiring to go to Savannah, went on board, carrying with her a three-year-old child, her nephew, and took her position as a passenger, with said child, on the upper deck aft, which was the only place or portion of the steamboat having any comforts or conveniences for passengers; that those who were willing to travel without the usual comforts and conveniences, were transported on the lower deck, but that said place was unfit for libellant and child; that some time after leaving the wharf the purser of the steamboat came to libellant, and declining to take any passage money from her, directed her to go to the lower deck, and, on her declining to do so, he informed her that he would put her off at Doboy wharf, to which place the said steamboat was drawing near; that she then appealed to the captain of said vessel, but obtained no substantial justice or protection; that on reaching Doboy, a port within this district, and having previously tendered the customary fare, which had been declined, the purser insisted that she should ride on the lower deck or that he would have her put off. Under these circumstances, and libellant not deeming the lower deck a fit place to occupy, and not desiring to be ejected from the steamboat with violence, yielded to the forced alternative, and with the child went out upon the wharf at Doboy and was compelled to remain there nearly six hours, when she was taken off by a passing steamer, and reached Savannah the next day; and by reason of said officers not allowing her to enjoy and receive the benefits of a first-class passage upon said boat, and by reason of their not performing their duties to carry her safely and properly, she has been damaged one thousand dollars. And also, that by reason of said illegal and unjustifiable actions of the said officers, and the manner in which she was forced to leave said steamboat, and the pain, indignity and humiliation thus done to, and inflicted upon her, she has suffered damage to the amount of two thousand dollars, in addition to the damages hereinbefore referred to, etc.

The answer of Lawrence, the claimant and agent, denies that libellant was entitled to the accommodations or particular privileges claimed by her, or that the lower deck was an unfit place for her to occupy as a passenger, but admits that the purser did tell her to go to the lower deck; that the purser gave her the option to accede to the rules and regulations or to go ashore at Doboy; that she went ashore there of her own volition and without paying any fare; that the rules and regulations of the boat, for the protection of passengers, and for the separation of the white and colored passengers, were reasonable and necessary for the prosecution of the business of the boat; that the upper deck and the cabin thereon were used solely by, and exclusively appropriated for white passengers, and the lower deck and cabin assigned for colored passengers and respectable people; and that these regulations were known to libellant at that time; that the lower cabin and deck were well ventilated, the state-rooms perfectly private and well fitted up, and the accommodations good and ample; that the accommodations offered to her, and which would have been provided for her, but for her own conduct in insisting to ride on the upper deck, were good, ample and sufficient for her, and all she had a right to expect or demand.

Another reason given by respondent for the purser's telling her to leave the upper deck, was that he had been informed by a passenger that she was a person of immoral character. But the evidence adduced, legally viewed, does not sustain this averment. Neither does it show any defamatory intention on his part. Therefore, I leave this matter entirely out of view in deciding the cause. I may remark that I find no material discrepancy between the answer of Lawrence and the testimony of Richardson, the purser.

The libellant testified that while on the upper

deck aft, the purser asked her if she had a ticket; she said "no;" that he then told her she must go down stairs and ride with the other colored people; that from this order she appealed to the captain, but without success; that she tendered the purser the fare, five dollars, but he declined it, telling her that the rules of the boat forbade her riding on the upper deck or in the upper cabin, for they were appropriated exclusively for the white passengers, and that if she did not go down stairs he would put her off at Doboy; that, declining to obey the order, on the arrival of the boat at Doboy she asked the purser if he meant to put her ashore, and he said "yes;" that then she went ashore and remained there some five hours, and then took another boat for Savannah. On her cross-examination she said: "I demanded to ride in the same cabin with the white people and on the same deck, and demanded the same and equal accommodations which the white people enjoyed, with the exception of going to the first table. * * * I insisted on riding up stairs in that cabin, and the purser insisted that if I did he would put me ashore at Doboy; I went ashore because I was afraid, from the way he spoke to me, that he would put me off, and having my nephew I was afraid one or the other of us would fall overboard. Nobody laid hands on me to put me ashore. * * * I did not ask him if he could furnish me a state-room down stairs, nor did I care whether he could or not, as I was unwilling to ride on the deck when out of my state-room. I would have refused any state-room he offered me down stairs, unless he would have allowed me to ride up stairs; by up stairs I mean the cabin, which the purser told me was allotted to white people. There were plenty of white passengers on board. I know the reason I went ashore at Doboy; it was because I insisted on riding in the cabin up stairs, and the purser would not allow me to do so. But for that refusal I would not have gone ashore at Doboy."

Lawrence, the claimant and agent, testified that there are two other decks and cabin besides the one referred to by libellant in her testimony; one deck, or a portion on of it, is for deck passengers; on the other deck are four state-rooms, which are generally set apart for colored passengers, but when there are none, and the boat is crowded, white passengers are placed in them; that if libellant had been content with these accommodations she could have had a state-room. These, he states, are perfectly private and convenient, and the fare from Darien to Savannah is five dollars for first-class, white or colored passengers. That in the cabin set apart for colored passengers, no one is allowed to ride except those who have first-class tickets and are colored, unless no colored passengers occupy that deck, and the boat is crowded, as stated; that the fitting up of these state-rooms is equally as comfortable as that in the upper cabin, the painting the same, carpets not as comfortable as in the white cabin, but the bedding is exactly the same in both cabins.

The testimony of Fleetwood, the master of the steamboat, is of like purport and effect as that of Lawrence. The master also testified that libellant, while on board, was noisy and exhibited much passion; that she had been playing on the piano, waltzing around the cabin, and making herself generally conspicuous, and that when she was going ashore at Doboy he saw and heard her threatening the purser, and daring him to come out on the wharf, saying what she would do with him. And the purser swears that libellant was not, to his knowledge, treated rudely or roughly while on board, and that it was his purpose to get along pleasantly with her. The libellant swears that she was treated by the purser rudely and harshly, not decently or respectfully. "He used no abusive language to me, with the exception of the tone of his voice, just as if I was a brute or something. The way he treated me as a brute was, he came to the passengers and collected the fare politely and turned to me and said, 'Say, have you a ticket?' and I said, 'No, but here is the money.' And he said, 'Go down stairs, or I will put you off at Doboy.'"

If, indeed, there is any imperfection in the laws regulating commerce among the States, more especially—looking to the controversy under consideration by this court—in regard to the transportation of white and colored passengers in the same cabin or apartment of steamboats, or other public conveyances engaged in inter-State commerce, then this "inaction" [by Congress], as was said by Mr. Justice Field, speaking for the court, in Welton v. The State, 1 Otto, 275; 3 Cent. L. J. 116 "is equivalent to a declaration that inter-State commerce shall remain free and untrammelled," and as it has not thought proper to declare that steamboats enrolled and licensed to ply between ports and places of the several States shall be compelled to carry white and colored passengers in the same cabins and staterooms, this court must turn to the common law to ascertain whether the rule of the proprietors or officers of this vessel, the City of Bridgeton, in requiring colored passengers to occupy separate cabins, saloons and state-rooms from those assigned to white passengers, is a reasonable regulation and one, which of right, the common carrier may prescribe and enforce.

The right of a passenger to a passage on board of a steamboat is not an unlimited right. The passenger is bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable. Whoever goes on board under ordinary circumstances impliedly contracts to obey such regulations, and may justly be refused a passage if he or she willfully resists or violates them. The City of Bridgeton was held out to the world as a common carrier of passengers, for hire, consequently free to all proper persons who sought transportation to ports or places agreed on within the *termini* of her route. But the vessel being thus open to passengers did not strip the owners or master of the right to make such suitable regulations as would promote the interests of the owners, and preserve order and decorum. Nor, on the other hand, could the proprietors, or master, be required to put passengers in the same cabin or stateroom, who would be repulsive or disagreeable to each other. See 5 Otto

504. In the West Chester and Philadelphia Railway Company v. Miles, 55 Pa. St. 209, the court decided that a common carrier may separate passengers in his conveyance, and that it was not an unreasonable regulation, for it prevented contacts and collisions arising from natural and well known repugnances, which are likely to breed disturbances where white and colored persons are huddled togesher without their consent.

In the recent case against the Board of Directors *et al.*, published in the Atlanta *Constitution*, of February 26th, 1879, and which involved the question as to whether colored children were entitled, as a matter of right, to be educated in the same school with white children, the United States Circuit Court for Louisiana answered the question in the negative. Said Mr. Justice Woods, in delivering the opinion of the court, "Equality of right does not involve the necessity of educating children of both sexes or age in the same school. Any classification which presumes substantially equal school advantages, does not impair any rights, and is not prohibited by the Constitution of the United States. 'Equality of rights does not necessarily imply identity of rights.'"

In Hall v. DeCuir, 5 Otto, 485, in error to the Supreme Court of Louisiana, Benson, the master of a steamboat, had refused a colored passenger, Mrs. DeCuir (the plaintiff below) the privilege of the cabin set apart for white passengers, notwithstanding the law of Louisiana had declared that common carriers of passengers should make no discrimination on account of race or color. Chief Justice Waite, in delivering the opinion of the Supreme Court of the United States, said that "Congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without as seemed to him most for the interest of all concerned. * * * We think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress, and not from the States." And Mr. Justice Clifford, in a concurring opinion, said: "It is clear that a steamer carrying passengers may have separate cabins and dining saloons for white persons and persons of color, for the plain reason that the laws of Congress contain nothing to prohibit such an arrangement."

The steamboat City of Bridgeton, like all vessels engaged in transporting passengers for hire between the several States, is ranked as a portion of the national marine, and consequently within the governing power of the national legislature. Congress has not deemed it necessary or essential to the welfare of the colored citizen to enact any law forbidding inter-State common carriers, by water or land, from regulating the business of their vessels or vehicles in such manner that the accommodations for colored passengers on their respective conveyances, may be distinct and separate from those assigned to white passengers, yet colored passengers are entitled to accommodations as suitable as those designated for the exclusive use of white passengers. And I am of opinion, upon perusal of the evidence adduced, that the cabin and state-rooms reserved for colored passengers on the City of Bridgeton were substantially equal to to those from which the libellant was excluded by the rules and regulations of the boat; and these, so far as they were enforced, were reasonable and highly proper, imposing neither burdensome nor impossible conditions on libellant. And as to the other question for decision, namely: the alleged illegal and unjustifiable manner in which the libellant was, as she says, forced to leave the boat, and the pain, indignity and humiliation inflicted upon her by the officers of the boat, this must be determined by the simple weight of evidence as in other civil cases, and thus guided, my judgment is that she has failed to establish her asserted grievances and mental sufferings.

It is therefore ordered, adjudged and decreed that the libel be dismissed with costs, to be taxed by the clerk.

GARNISHMENT—MONEY IN CUSTODIA LEGIS.

IN RE CUNNINGHAM.

United States District Court, District of Iowa, August, 1879,

The rule that money *in custodia legis* is not subject to process is applicable to the case of funds in the hands of an assignee in bankruptcy which another is attempting to secure by garnishment.

Gillmore & Anderson and *Joseph G. Anderson*, for Alexander; *James & Frank Hagerman*, for intervenor.

LOVE, J.:

The case before the court is this: On the —— day of ——, 1876, Cunningham & Mason were by this court adjudged bankrupts, and Harry Fulton chosen assignee. This court, in bankruptcy, on the 22d day of September, 1877, declared a dividend of said estate, and ordered the assignee to pay the same to the creditors. Among the creditors were Matthews & Co., to whom the court adjudged a dividend of $488.38. Subsequent to the order declaring the dividend, and directing the assignee to pay the same—but before the assignee made the payment—that is to say, on the 29th day of September, 1877, Miller Alexander, to whom Matthews & Co. were indebted by note, commenced a suit in the circuit court of Lee county, Iowa, and garnisheed Harry Fulton, the assignee, seeking to obtain satisfaction out of the dividend in his hands which had been adjudged to Matthews & Co. Miller Alexander transferred his right of action to Fontaine Alexander, who was duly substituted as plaintiff in the State court, and who, in due course, obtained judgment against Matthews

& Co. in the State circuit court for the full amount of his claim, and against Harry Fulton, as garnishee, for said sum of $488.38. The judgment against the garnishee, Fulton, was somewhat peculiar. It provided that no execution should issue until the District Court of the United States for the district of Iowa, should order said Harry Fulton, assignee, to pay said sum to plaintiff. On the 16th day of January, 1878, Miller Alexander presented his petition to this court, praying that Harry Fulton be ordered to pay the sum due from him to said Matthews & Co. to the sheriff of Lee county to abide the judgment of the State court.

It further appears that, on the 28th day of April, 1879, said Matthews & Co., for a valuable consideration, transferred and assigned, to one Elbert G. Roberts, who intervenes in the case, the said dividend, amounting to said sum of $488.38, authorizing him to collect the same, etc. Harry Fulton also intervenes, answering petitions of plaintiff and said Roberts, asking to be protected.

It is well settled that money or property in *custodia legis* can not be reached by garnishment on execution in the absence of statutory authority. This doctrine has been applied in numerous cases; to various classes of legal custodians, such as receivers, sheriffs, clerks of court, executors and administrators, treasurers, assignees in bankruptcy, etc. Patterson v. Pratt, 19 Ia. 358; Drake on Attachments, 5th ed., ch. 22, 493 to 516. Property in hands of a receiver is in *custodia legis*, and is exempt from execution or attachment: Watson v. Davis, 21 Ia. 539; Wiswall v. Sampson, 14 How. 52; Columbian Book Co. v. DeGolyer, 115 Mass. 69; Glenn v. Gill, 2 Md. 1; Taylor v. Gillean, 23 Tex. 508; Field v. Jones, 11 Ga. 413; Nelson v. Connor, 6 Rob. (La.) 339; Langdon v. Lockett, 6 Ala. 727; Farmers' Bank v. Beaston, 7 Gill. & John. 421; Gouverneur v. Warner, 2 Sandf. 624; Co. of Yuba v. Adams & Co., 7 Cal. 35; Bently v. Shrieve, 4 Md. Chy. Dec. 412; Freeman on Executions, 129; Drake on Attachment, 509; Robinson v. A. & G. Ry. Co., 66 Pa. St. 160. Same rule applies to garnishment: Glenn v. Gill, 2 Md. 1; Taylor v. Gillian, 23 Tex. 508; Columbian Book Co. v. De Golyer, 115 Mass. 69; High on Receivers, 151. Applied to trustee appointed by the court: Bentley v. Shrieve, 4 Md. Chy. 412. See Jones v. Gorham, 2 Mass. 375; DeCoster v. Livermore, 4 Mass. 101, in which assignees, under the bankrupt law of 1800, were charged. But the question was not raised nor considered, and the cases were afterwards overruled in Colby v. Coates, 6 Cush. 558.

The rule was applied to sheriffs: Wilder v. Bailey, 3 Mass. 289. To county treasurers: Chealy v. Brewer, 7 Mass. 259. To executors and administrators: Brooks v. Cook, 8 Mass. 246. Colby v. Coates, 6 Cush. 558, decided that an assignee, under the insolvent law of Massachusetts, can not be reached by trustee process; approved and followed in Columbian Book Co. v. DeGolyer, 115 Mass. 69. Dewing v. Wentworth, 11 Cush. 499. Assignees in bankruptcy can not be charged as garnishees in State courts; *Re* Bridgman, 2 Bk. Reg. 522; Jackson v. Miller, 9 Bk. Reg. 252. The remedy to reach this fund is to have a receiver appointed to represent this fund in bankrupt court. Jackson v. Miller, 9 Bk. Reg. 143; or by creditors' bill before judgment, Pendleton v. Perkins, 49 Mo. 565; Thompson v. Scott, 4 Dillon, 508. The State court has no authority to bring an assignee before it who is acting under the orders of the United States court. Akins v. Stradley, 1 N. W. Rep. (N. S.) 609.

The reason of this doctrine seems to be that the court, having the money or property in its custody under the law, holds it for some purpose, of which that court is exclusive judge. To permit property or money thus held, to be seized on execution, attached or garnisheed, would, therefore, defeat the very purpose for which it is held, and, in many cases, enable some other court to dispose of the property or money, and wholly divest it from the end or purpose for which possession has been taken. A conflict of jurisdiction and decision would, in many cases, thus ensue. Thus, the court in possession of the property or money might order it to be distributed or paid in a certain way, while the court issuing the process of garnishment might order and adjudge a wholly different designation of the property or money. To attempt a seizure of property by attachment in some other court would necessarily bring the two tribunals into collision, and would, if successful, wholly withdraw the property from the power of the court in possession, and divert it from the purpose for which possession has been taken.

The true doctrine is that, when property or money is in *custodia legis*, the officer holding it is the mere hand of the court; his possession is the possession of the court; to interfere with his possession is to invade the jurisdiction of the court itself, and an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied. How can such an officer, when garnisheed, know what answer he can make with safety to himself, in advance of the orders and judgments of the court having possession of the property and jurisdiction of his person? How could such an officer safely expose himself by his answer as garnishee to the danger of a personal judgment in some other court, before the determinations of the court having control of him and the property? Suppose the court, whose hand and agent he is, should order and direct him, in a given case, to make one disposition of the property or money, and the court issuing the process of garnishment should enter judgment against him, requiring a wholly different disposition of it, which judgment should he obey? He would be like a soldier between two fires, and he would inevitably fall under one or the other. But by far the deadlier fire of the two would be that of his own court, since he would not only, by a disobedience of its orders, expose himself to a suit upon his official bond, but to punishment for contempt.

In this view of the subject, it has been held in some cases that, when the court having charge of the property, money or funds makes final orders for its distribution, the officer whose duty it is

simply to turn over to each individual distributee the amount awarded to him by the final judgment of the court, may be garnished by a creditor of a party to whom the dividend or distributive share has been adjudged. Thus, in New Hampshire, Delaware and Missouri, while the principle announced in Massachusetts was recognized as sound, it was considered to be inapplicable when an administrator had been, by the proper tribunal, adjudged and ordered to pay a certain sum to a creditor of the estate, and in such case the administrator was charged as trustee of the party to whom the money was ordered to be paid. Adams v. Barrett, 2 N. H. 374; Fitchett v. Dolbee, 3 Harr. (Del.) 267; Curling v. Hyde, 10 Mo. 374; Richards v. Griggs, 16 Mo. 416.

The reason of this exception was given by the Superior Court of New Hampshire, and adopted by the Supreme Court of Missouri in the following language: "An administrator, till he is personally liable to an action in consequence of his private promise—the settlement of the estate, or some decree against him, or other cause—can not be liable to a trustee process. Because till some such event, the principal has no ground of action against him in his private capacity, and he is bound to account otherwise for the funds in his hands. The suit against him till such an event, is against him in his representative capacity, and the execution must issue to be levied *de bonis testatoris* and not *de bonis propriis*. But in the present case, the trustee was liable in his private capacity to the defendant for the dividend. The debt has been liquidated, and the decree of payment passed. The debt was also due immediately. Execution for it ran against his own goods, and the trustee process would introduce neither delay nor embarrassment in the final settlement of the estate." The doctrine of this case is that where the court having custody of the money, fund or property, and jurisdiction of the subject-matter, makes a final determination of the matter, and awards judgment as to the amount to be paid to each individual distributee, the officer thus required to make payment may be made personally liable for his failure to make the payment, and therefore a garnishment against him, resulting in a personal judgment, is no invasion of the jurisdiction of the court having the property in custody, and no encroachment upon the possession of that court. On the contrary, the garnishment recognizes the action of the court ordering the payment or distribution, and founds itself upon the judgment of that court. When the judgment in the garnishment proceeding must needs be against the garnishee in his representative capacity, the proceeding must fail, because it could be levied neither upon the garnishee's private property nor upon the property he represents; not upon the former, because the judgment is not personal, nor upon the latter, because the property which he represents is in the possession and under the control of another court, whose possession and jurisdiction can not be invaded.

It might be supposed, upon a hasty glance, that the principle laid down in the New Hamshire, Delaware and Missouri cases is applicable to the case now before the court. Here the court of bankruptcy has declared a dividend, and determined specifically what each creditor is entitled to. It has ordered the assignee to pay a specific sum to the judgment debtor in the State court from which the process of garnishment issued. If the assignee failed to pay that sum, he would be liable to a personal action; why, therefore, may he not be garnished? Why may not a personal judgment be rendered against him, as garnishee for the amount of the dividend, since a personal action could be maintained by the judgment creditor against him for the same cause?

There is, in my judgment, an insuperable difficulty in recognizing this view in the present case, growing out of the peculiar jurisdiction in bankruptcy. It can not for a moment be doubted that the court of bankruptcy has exclusive jurisdiction of the bankrupt's estate, and of its administration from the time of the adjudication to the final discharge of the estate, and the discharge of the assignee. This jurisdiction does not, by any means, cease with the order of distribution. It is clearly within the power of the court, and its duty to see that its assignee pays over to the distributees the dividends awarded to them. The assignee failing to perform this duty, the court would punish him for contempt—order a suit upon his official bond, and refuse to give him a final discharge. This jurisdiction is exclusive. No other court can touch, or bind the assets of the bankrupt, or authorize any suit against the assignee, who is the officer of the court. It follows that any action in any other tribunal, aiming to control the action of the assignee, or directly or indirectly compel the assignee to dispose of the assets or pay over money in his hands belonging to the estate, must be utterly without jurisdiction, and therefore null and void. What is the effect of a garnishment of the assignee? It either compels him to suspend payment to the distributee in bankruptcy, in pursuance of the order and judgment of the bankrupt court, or it is without any legal efficacy whatever. The nature of every garnishment is that the garnishee must, upon receiving the notice, keep the property, money or debts in *statu quo*, to await the final judgment of the court issuing the process. The notice of garnishment to the assignee in this case had that effect, or it was wholly nugatory. But how could the State court, without any jurisdiction whatever, issue any process to arrest the action of the assignee in the payment of dividends ordered by the court of bankruptcy. How could a court manifestly without jurisdiction, thus by its process and judgment effect the administration of, and final distribution of the bankrupt's estate? To sum up the argument, the court of bankruptcy having exclusive jurisdiction, orders its assignee to distribute the estate to the creditors, in dividends declared by the court; but a State court, without any jurisdiction whatever, sends its process to the assignee, commanding him in substance, not to pay over the dividends, but to await the final judgment of the State court! Which of these commands shall the assignee obey? And if this could be done it might result in postponing almost indefinitely, the final settlement of bank-

rupts' estates; for there might be numberless suits against the creditors in bankruptcy, and, of course, there could be no final settlement and distribution until the final action and judgment in the State courts in the principal actions. Hence the proceedings in bankruptcy would have to be stayed, to await the slow and tedious course of justice, which might prove to be long protracted litigation in the State courts.

It was argued that this court, seeing the justice of the petitioner's claim as a creditor, would, by a sort of comity, recognize the judgment of the State court, and order the assignee to pay the dividend upon it. Comity is a vague and undefined principle in our jurisprudence. I do not know of any law or usage which would justify the court in making such an order. If the question were between the original parties, there would be less difficulty; but other rights have intervened. The dividend has been assigned, and the assignee is before the court claiming under his assignment. Seeing that the garnishment was without jurisdiction, and therefore absolutely null, there was no lien, and nothing pending in the nature of a judicial proceeding of which the assignee of the dividend was bound to take notice. I can not, therefore, see but that he had a perfect right to purchase the dividend, and take a transfer of it. And if he did, and paid his money for it, his equity is at least equal to that of the attaching creditor. There is, therefore, no overruling consideration of equity to induce the court to resort to some extraordinary remedy unknown to the law, to aid the attaching creditor as against the assignee of the dividend.

The fund should be paid to Roberts, the interve nor.

PRINCIPAL AND AGENT—LUNACY—REVOCATION OF AUTHORITY.

DREW v. NUNN.

English Court of Appeal, May, 1879.

1. WHERE A PRINCIPAL BECOMES LUNATIC, after holding out an agent as having authority to contract on his behalf, he is liable on contracts made by the agent with a third person to whom such authority has been held out, and who has had no notice of the lunacy.

2. WHERE THE LUNACY OF A PRINCIPAL is of so serious a nature as to render him incapable of contracting on his own behalf, it revokes an authority to contract for him previously given to an agent.

The action was tried before Mellor, J., and a jury at Westminster, and the facts proved or admitted at the trial were as follows:

The plaintiff's claim was for £99 4s. 4d., the price of boots and shoes supplied by the plaintiff to the defendant upon the order of the defendant's wife. From the beginning of the year 1872 till the close of the year 1873 the defendant, who was residing in London with his wife and family, dealt with the plaintiff on credit, and in August, 1872, paid by check a bill at that time owing to the plaintiff for goods supplied to his wife's order. In November, 1873, the defendant authorized his agent to pay the whole of his income to his wife, and, further, gave her authority to draw checks at discretion. In December, 1873, the defendant became lunatic, and was confined in a private asylum until April, 1877. Between April, 1876, and July, 1877, the defendant's wife ordered, and the plaintiff supplied to her on credit, certain goods, the price of which was claimed in this action. At that time the plaintiff was not aware that the defendant had become lunatic, or that he had authorized his wife to receive his income. In June, 1877, the defendant, having recovered his reason, ordered his agent to cease paying his income over to his wife, and also revoked the authority previously given her to draw checks. On these facts, the learned judge at the trial declined to leave to the jury the question whether, at the time the goods in question were supplied, the income received by the defendant's wife was sufficient for the maintenance of herself and family, and directed the jury to find for the plaintiff for the amount claimed.

The defendant appealed to this court, and obtained a rule *nisi* for a new trial on the ground of misdirection.

Willis, Q. C., and *R. O. B. Lane*, for the plaintiff: There was no misdirection, and the verdict should not be disturbed. First, the authority given to the defendant's wife to pledge her husband's credit was not determined by his subsequent lunacy. Insanity is different from marriage or death. A contract entered into with a lunatic may be enforced where no advantage is taken of his incapacity, where the consideration is executed in whole or in part, and where the person contracting is unawafe of the incapacity of the lunatic. Baxter v. Earl of Portsmouth, 5 B. & C. 170; Molton v. Camroux, 2 Ex. 487. So also where the person contracting is aware of the incapacity of the lunatic, if no advantage is taken, the contract may be enforced. Brown v. Jodrell, 3 C. & P. 30 (*per* Lord Tenterden); Dane v. Viscountess Kirkwall, 8 C. & P. 679; Niell v. Morley, 9 Ves. 478. Subsequent lunacy does not revoke the appointment of an agent previously made. Stead v. Thornton (note to Stephens v. Badcock, 3 B. & Ad. 357) was decided upon the ground that the lunatic was incompetent to appoint an agent. So also Tarbuck v. Bispham, 2 M. & W. 2; Read v. Legard, 6 Ex. 636, does not apply, nor does Davidson v. Wood, 11 W. R. 791, in which a lunatic husband's estate was held liable for necessaries supplied to the wife: see Richardson v. Du Bois, 18 W. R. 62; L. R. 5 Q. B. 51. Story on Agency, 7th ed. § 481, doubts whether lunacy revokes an agent's authority until the lunacy has been established by inquisition (note to Manby v. Scott, 2 Smith's Leading Cases, 7th ed. 479). Secondly, even if lunacy revokes the authority of an agent, a person to whom the agent has been held out as having authority, and who has had no notice of the lunacy, is not bound by the revocation. Apart from the question of insanity, the revocation of an agent's authority does not relieve the principal

from liability unless that revocation is communicated to persons dealing with the agent.

Horne Payne, for the defendant: The second point is not open to the plaintiff, for there was no finding of the jury that the defendant held out his wife as having express authority to pledge his credit. As to the first point, lunacy clearly revokes an agent's authority, and is analogous to cases of death or marriage. A lunatic's marriage is void if at the time of the ceremony he was incapable of understanding the nature of his acts. Browning v. Reane, 2 Phill. Ecc. Cas. 69; Howard v. Digby, 2 Cl. & Fin. 634. Both Stead v. Thornton and Tarbuck v. Bispham, cited by the other side, show that a lunatic is incompetent to appoint an agent, and Story on Agency, 7th ed. § 6, says that idiots and lunatics are wholly incapable of delegating authority to agents. Besides, if lunacy does not revoke the agent's authority, the inconveniences might be very great, as that authority never can be revoked during the whole period of the lunacy. As regards death operating as a revocation of authority, see Blades v. Free, 9 B. & Cr. 167, referred to in Smout v. Ilbery, 10 M. & W. 1.

BRETT, L. J.

This case has stood over for a long time, principally on my account, in order that I might make every effort to see if I could determine it on a satisfactory principle. I confess to having found it one of the most difficult and least satisfactorily explained doctrines I have ever found in the English law.

It was a case tried before Mr. Justice Mellor, in which the plaintiff brought an action against the defendant for boots and shoes supplied to the defendant's wife, and the facts of the case, which are beyond dispute, are that the defendant, when sane, had held out that he had given to his wife absolute authority to act for him, and that he had held out to the plaintiff that he had given his wife such authority. I think it must be taken that afterwards the defendant became, not merely insane, but so insane that he could not have contracted on his own behalf, and so insane that if he had been seen by any one proposing to contract with him, Shultz
such person must have seen at once that the defendant was so insane as really to have no mind at all. Under these circumstances, the defendant's wife ordered certain goods from the plaintiff, who had no notice of the defendant's lunacy. Her husband was confined for a time in a lunatic asylum, but afterwards recoved, and after his recovery this action is brought against him, and he defends it on the ground that the authority he had given to his wife to act for him was put an end to by insanity to the degree I have stated, and that therefore he is not liable to the plaintiff, and the plaintiff cannot recover. Mr. Justice Mellor left no question to the jury as to the amount of the insanity of the defendant, but directed them, as a matter of law, that the plaintiff was entitled to recover. I think upon that direction—no question having been left to the jury in the matter—that we must assume that insanity existed to the extent I have mentioned.

Two questions then arise—first of all, does such insanity put an end to the authority of the agent—that is, cause the mandate or authority to cease? One would have thought such a question as that would have been clearly decided on clear principles, and one naturally looked at the ordinary authorities on such matters—Story on Agency, the Scotch authorities, Pothier and other French authorities—but I have found no satisfactory conclusion arrived at.

If it had been held that such insanity did not put an end to the agent's authority, then that would decide this case, and the plaintiff would be entitled to recover on that ground; but, in my own individual opinion, such insanity does put an end to the authority. It was admitted that certain changes of *status* in the principal did put an end to the authority, as, for instance, if a woman be the principal who has appointed an agent, marriage puts an end to the authority of the agent, bankruptcy of the principal puts an end to the authority of the agent, death of the principal puts an end to the authority of the agent.

It has been said that the authority is put an end to because the person who would be liable is a different person from the original principal—that is to say, in a case of marriage, the husband would be the person to be bound, and in a case of bankruptcy the assignee, and in a case of death the heir or the executors.

If the change of person were the real ground on which we had to proceed, then it seems to follow that lunacy of the principal would not put an end to the authority until the lunacy had been established by a commission, so that there would be the committee to be made liable instead of the lunatic; but I cannot think that that is a satisfactory principle, for in a case of bankruptcy the assignees are bound to carry out any contract made before bankruptcy of the principal, though, they are different persons; in cases of death the executors or representatives of the dead person are bound to do so, and I see no reason why they should be in a different position from the principal. I cannot help thinking, therefore, that the true ground of the doctrine is that the agent, being a person appointed to act for the principal, from the moment the principal himself could not act according to law, the agent who represents him cannot act for him. If so, lunacy, to the extent of the lunacy in this case, lunacy so great that the principal can have no contracting mind, and so great that the person who contracted with him must see that, and if so, the principal was a person who could not contract himself, who could not do a legal act himself for want of mind, then, if the principle I have stated is true, as the principal himself could not contract or do the act himself, his agent cannot do so for him, and that is the principle on which I think the authority is put an end to.

Such lunacy, therefore, to my mind, puts an end to the authority of the agent, and if any agent acts for a principal after such a state of lunacy in the principal is brought to his knowledge, it seems to me he is liable to any person with whom he acted for so purporting to act on behalf of the principal—

as between the agent and the principal the authority would be clearly at an end, and the agent would be doing a wrongful act both to the principal and to the person with whom he dealt, if he acted for the principal. And, therefore, I should say this lady, who must be taken to have known of her husband's lunacy, if she had acted with anybody to whom her authority had not been held out, would have acted wrongly as regards that person and so as not to bind her husband or the estate; and though it might be difficult to make her liable, she herself being a married woman, yet, if the agent were not a married woman and had so acted to a person, in the first instance, to whom no authority had been held out, I should say the contract would be void as against the supposed principal, and the agent would himself be liable for the wrongful act and for misleading an innocent person. But then comes the question where the authority of the agent has been held out to a person who does not at the time he so acts know of and has no notice of the lunacy of the principal. The agent may be held out in one or two ways; there may be an authority given to an agent which, of itself, asserts that he has authority—such as a power of attorney; if that be given to an agent by a person who becomes a lunatic, and be acted on after lunacy by the agent, the production of the power of attorney is an assertion by the agent that he has authority; and that power of attorney, if it was given before the principal was insane, is a representation by the principal, at a time when he was sane, that this person might act for him; and in such a case, if the agent acted with a person not having notice of the lunacy, he would be doing so with the authority held out by the lunatic when sane.

An authority can be held out in another way, as in the present case, where the principal, whilst sane, held out to a person that his agent had authority to act for him.

Then, we take the case that the agent knows of the lunacy, and, after the lunacy exists, and when in fact and in law his authority as agent has expired, nevertheless acts as agent with a person contrary to his authority or after his authority has ceased, what is then to be the consequence?

It seems to me that a person who acts without knowing of the lunacy has a right to act so, and, therefore, if he so acts, being ignorant of the lunacy, the lunatic, if he recovers, is bound by his acts, he having held out the agent to have had authority, and he cannot retract that authority.

It is difficult to state the grounds of these principles of law. It has been sometimes said that it is a "contract." I confess I cannot see that. It has been said that it is on the ground of "estoppel;" it is somewhat difficult to say that it is strictly an "estoppel." It is also said that it is a representation on which the person, so long as he has no notice to the contrary, is entitled to act. There is an elaborate note in Story on Agency by the editors of the 7th edition, in which they give it ultimately as their opinion, after considering the law in every form, that it is to be defended on the ground of public policy; it has been said also that it is in aid of mercantile business. To my mind the better way of stating the principle is that it is a representation made by a lunatic when he is sane and in a position to make that representation which an innocent party had a right to act on, and which if there had never been any lunacy would have made the person who made that statement liable on the ground that he had made a representation on which the innocent party had a right to act.

Suppose there is no lunacy at all, and that a person holds out another to be his agent, and then of his own accord withdraws that agency, and that, therefore, as between the principal and the agent the authority to bind the principal has ceased, then the agent does a wrongful act with regard to the principal in binding him; nevertheless, if the principal made a representation that that person was his agent to the person with whom the agent acts, and the latter acts with the agent before he received any notice of the revocation of the agency at all, the principal is bound on the ground that he did make a representation on which the other party had a right to act, and cannot retract from the consequences of that representation. But it is true if the principal becomes a lunatic he cannot himself give any notice, and he may therefore be an innocent sufferer; but so is the other person an innocent sufferer; and it is a principle of law that where there are two innocent persons the one who has been the original cause of the representation or state of things on which the other acts is, on the whole, the person who must suffer.

I am, therefore, of opinion that, though the lunatic recovers his reason, after he has recovered he can not, any more than if he had never been a lunatic at all, say that the person who has trusted to his representations, made before he was lunatic, had no right to do so. A difficulty no doubt arises in such cases, and one ought to have a principle to give to all the cases, and for my part, though it is not necessary to decide the question, I should think that the same rule would apply in cases of death as does in cases of lunacy, and if the representations were made by the principal whilst alive, and a third person after his death acted on the faith of that representation after the death of the principal and without knowledge of it, the executors would be bound by the representation and the estate would suffer, and not the person who trusted in the representation. Therefore, on these grounds, I think that the authority was put an end to by the lunacy in this case, and the plaintiff can not recover on the ground that the agent had authority to bind his principal. But though the agent had no authority to bind his principal in this case at the time the contract was made, nevertheless the plaintiff is entitled to recover, because the lunatic whilst sane, made a representation to the plaintiff on which the plaintiff was entitled to act until the plaintiff had notice of the lunacy, and the plaintiff had no such notice.

I am of opinion, therefore, that the plaintiff is entitled to recover on that ground, and that Mr. Justice Mellor was right in directing the jury to find for the plaintiff.

BRAMWELL, L. J.:

I am of the same opinion, and desire to add only a few words to the judgment of Lord Justice Brett, with which I entirely agree.

It must be taken in this case that the defendant represented to, and gave the plaintiff to understand, that the defendant's wife was his agent to contract debts in the way of the plaintiff's trade with him, and the plaintiff might continue to deal with her on that responsibility of the defendant that she had authority to contract for him. That is the effect of the facts in this case. It is clear that when such an authority as that is given to any one, it continues until revoked, and until notice of such revocation is given to the person who has been told that he may deal with the agent. That is the general rule. Then it is said that for some reason or another that does not apply where the revocation is not intentional, bnt arises by reason of insanity. Why?

It may certainly be hard on the person who gives the authority, but it is also hard on the person who acts on the authority without notice of its revocation. Insanity is not a privilege, but is a disability, which is not, however, to affect a person more than necessarily; it is not something which is to give a benefit to another which he had not before; it is not to operate injuriously to another person. There is no reason, therefore, why it should be taken out of the general rule to which I have referred. It would be a most alarming thing if it were. If it were, in all cases of a general authority being given, any person who dealt with a lunatic most innocently (and the very agent himself possibly), not having notice of the revocation, or having such notice and yet believing that the best thing he could do for the lunatic was to continue the agency—in all cases like that, if the argument for the defendant were right, the person who was the agent would be subject to be treated as liable to pay over again, or make good any mischief that might result from having continued to deal with a third person.

With respect to the reason of the rule I shall not venture to lay it down with any peremptoriness; but I can not help thinking the reason of the rule is the same as in the case of a guarantee, when a person says, "You supply goods to A. B., and I will pay you until I tell you to the contrary," or "until I revoke this authority."

Suppose I revoke the authority or become a lunatic, but the intelligence of that has not reached the supplier of the goods. It seems to me that the reason of the rule is something of the nature that I have mentioned, that is, either an agreement with the person or a license, and it is an agreement or a license which exists till notice of the revocation is given.

My brother Brett assumed that the defendant was in such a state of insanity that it would be of itself a revocation of authority. I do not know that. I, for my part, am not prepared to say that every insanity is a revocation of authority or prevents a person from contracting. I should require something approaching *dementia* before I said that. If the defendant could understand that his wife was pledging his credit for necessaries, I do not see why being mad should relieve him from being liable.

When a person has really no mind, of course he is incapable of contracting, just as if he were a person who is dead—he has no contracting intelligence—but I doubt if that was so in this case. Lord Justice Brett says that, taking Mr. Justice Mellor's direction, we must assume that was his condition; if so, the only way in which this judgment could be supported is on the other ground pointed out. I think it is supported on that ground and therefore that it should be affirmed.

BRETT, L. J.:

Lord Justice Cotton agrees with the conclusion we have arrived at, but does not wish to pledge himself to any determination as to whether the authority was in fact put an end to, or whether it is at an end in the case of lunacy, until a person is found so by a commission of lunacy. As to the point of the holding out of the authority, he is inclined to think the principle of the doctrine is that it was a contract between a person who has made a representation and a person to whom the representation was made, and, until notice was given of revocation, the principal would be bound by the acts of the agent. Thinking it unnecessary to determine the first point, he wishes his judgment to be on the ground of the holding out, on the footing that the former contract between the plaintiff and defendant was not put an end to.

I should like to say that if there had been any question as to the extent of the lunacy it ought to have been left to the jury, and the only reason why I assumed in this case the lunacy to be to the extent I have stated, was that I think we must assume so, or else it ought to have been a question left to the jury. It was in the argument admitted in effect that the defendant was in such a state of lunacy that he could not have contracted himself. I should be always very loth indeed, where lunacy is set up, to believe there was lunacy to this extent until it was clearly proved; for mere weakness of mind, or partial insanity, leaving sufficient mind to contract, would not bring the case within the rule I have stated.

Rule discharged.

SOME RECENT FOREIGN DECISIONS.

CORPORATIONS — WHEN SHAREHOLDER MAY BRING ACTION AGAINST.—Where fraud is alleged to have been committed by persons who can command a majority of votes in a company, an action can be brought by one shareholder in his own name on behalf of the others; and he has no right to sue in the name of the company without the company's consent. Menier v. Hooper's Telegraph Works, 22 W. R. 396; L. R. 9 Ch. 350, followed. Duckett v. Gover, 25 W. R. 554; 6 Ch. Div. 82, explained.—*Mason v. Harris*. English Court of Appeal, 27 W. R. 699.

CONSTRUCTION OF "ANY PERSON." — By the Pharmacy act of 1868, sec. 15, "any person" who carries on the business or takes the title of chemist and druggist, not being a duly registered pharmaceutical chemist within the meaning of the act, is made liable

to a penalty. The defendants, a limited company registered under the Companies Acts, carried on amongst other things the business of chemists and druggists. Only one shareholder of the company was a duly registered chemist. He, with the aid of two qualified assistants, conducted the drug department, and received a salary from the company for so doing. *Held*, that the defendants were "a person" within the meaning of the act, and were liable in their corporate capacity to the penalty.—*Council of Pharmaceutical Soc. v. London, etc. Assn.* English Court of Appeal, 27 W. R. 709.

SPECIFIC PERFORMANCE—NON-PAYMENT OF THE PURCHASE-MONEY BY DEFENDANT AFTER JUDGMENT—DAMAGES.—After judgment for specific performance of an agreement for the purchase of freeholds, and after non-payment by the defendant of the amount certified for purchase-money, interest and cost, the court will make an order for rescission of the agreement; but Watson v. Cox, 21 W. R. 310; L. R. 15 Eq. 219, and Sweet v. Meredith, 4 Giff. 207; 9 Jur. N. S. 569; 11 W. R. Ch. Dig. 118, are not authorities that the plaintiff under such circumstances can obtain both rescission and damages.—*Henty v. Schroder.* English High Court, Chy. Div. 27 W. R. 833.

COMPANY — PROMOTER — PERSON OTHER THAN DIRECTOR OCCUPYING FIDUCIARY POSITION.— The defendants assisted one P in selling a mine of which he was possessed, to the plaintiffs, P promising to remunerate the defendants out of the purchase-money. The defendants, who had previously been connected with the mine as metal brokers, were mentioned in the prospectus as persons to whom reference might be made, and were in fact referred to by intending purchasers of shares; but, although the defendants had doubts as to the real value of the mine, they did not disclose them to the persons who so applied to them. The mine was sold to the plaintiffs for £1,000,000, half of which sum was paid in fully paid-up shares. P, in pursuance of the arrangement between the defendants and himself, which was unknown to the plaintiffs, gave the former 250 of the said shares. *Held*, that these facts constituted ample evidence to warrant the finding of the jury that the defendants were promoters of the plaintiff company, and the verdict for the latter for the value of the 250 shares must stand; as a person, though not a director, may be a promoter of an incorporated company whose capital has not been taken up. *Held*, also, that it was unnecessary for the judge to give the jury a definition of the term "promoter," as it would not have been of any advantage to the defendants, nor have given any real assistance to the jury. —*Emma Silver Mining Co. v. Lewis.* English High Court, C. P. Div. 27 W. R. 836.

TROVER—DELIVERY OF GOODS BY WAREHOUSEMAN BEFORE RECEIVING PRINCIPAL'S ORDER — DAMAGES.—The plaintiffs employed G as their agent to sell grain, from time to time assigned by the plaintiffs to the defendants' station at Birmingham, to be there held by the defendants to the plaintiffs' order. G used to take samples from the grain at the defendants' station for the purpose of effecting a sale, and on effecting a sale used to communicate the particulars to the plaintiffs, and they forwarded a delivery order on the defendants to the purchaser, who thereupon obtained delivery of the grain. In 1873, the plaintiffs discovered that G had on various occasions fraudulently obtained grain from the defendants, and which the defendants had delivered before receiving plaintiffs' orders, by making sales to persons in his own employ and fictitious persons, and then presenting to the defendants orders signed either ostensibly by such persons and endorsed to him, or orders for delivery to himself, or orders signed by himself for the defendants without their authority. In two cases, where the defendants had delivered without any orders, the plaintiffs had been paid for the grain delivered, but in other cases of pre-delivery to G's orders the plaintiffs had not been paid, but the purchasers, to whom the plaintiffs originally sent the delivery orders, were at the time debited in the plaintiffs' books with the amounts which still remained due to the plaintiffs; and subsequently to such pre-deliveries, the defendants received from G the plaintiffs' delivery orders, indorsed over to him by the original purchasers; the plaintiffs not knowing, when they sent the orders and made the debits in their books, that the defendants had parted with the goods before receiving the plaintiffs' orders. In an action by the plaintiffs to recover from the defendants: 1, damages by reason of pre-delivery without plaintiffs' orders, although the plaintiffs had been paid for the grain subsequently to such orders; and 2, the value of the grain in the cases of pre-delivery in which they had not been paid. *Held* (per Bramwell and Thesiger, L.JJ.), that there had been a technical conversion of the grain by the defendants, but that the plaintiffs were only entitled to recover nominal damages. *Held* (per Baggally, L.J.), that though there had been a conversion, the plaintiffs were not entitled to even nominal damages, for they had suffered no damage at all. —*Hiort v. London, etc. R. Co.* English Court of Appeal, 27 W. R. 778.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MAINE.

[Advance sheets of 69 Me.]

FALSE PRETENSES—SUFFICIENCY OF INDICTMENT. —1. An indictment can not be sustained, the substance of the allegations being that the respondent got money in placing a mortgage upon land by falsely representing that the land was well wooded and well timbered, and had upon it a valuable growth of hard and soft wood and hemlock bark, and contained about one thousand acres; when in fact the land was not well wooded and well timbered, and did not have upon it a valuable growth of wood, bark or timber, and did not contain one hundred acres. Had the indictment alleged that there was at the time of the representations no wooded growth upon the land, the representations might have been criminal. But the fact should be laid directly and positively, and not inferentially, or by way of recital merely. 2. The want of a direct and positive allegation, in the description of the substance, nature or manner of the offense, can not be supplied by any intendment, argument or implication whatever. Opinion by PETERS, J.—*State v. Paul.*

NEGOTIABLE PAPER—FRAUD—BURDEN OF PROOF. —1. In an action by an indorsee against the maker of a note, if fraud in the inception of the note be proved by the maker, that casts the burden upon the indorsee to prove that he took the note before maturity for value and without notice of the fraud. It is immaterial that he might have known of the fraud by the use of diligence, if he did not in fact know of it, and purchased the note in good faith. This burden is, *prima facie*, sustained by the indorsee by showing that the note was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith, without notice of the fraud. But where there is evidence on both sides affecting the several points or propositions necessary to be proved, then the general burden of

proof is upon the indorsee to make them out, he having the natural presumptions in his favor. 2. The purchase by an indorsee must be "in the usual course of business," which means according to the customs and usuages of commercial transactions; and if he purchases a note before maturity for value, that constitutes such a transaction. Opinion by PETERS, J.—*Kellogg v. Curtis.*

DEFECTIVE HIGHWAY—NEGLIGENCE—NO LIABILITY FOR OBJECTS OUTSIDE THE TRAVELED WAY.—1. It is not required that a highway, in its whole width as located, should be fitted for travel. It is enough if there be a wrought road in good condition and of suitable width for all the needs of the public. 2. Objects outside the traveled way, and not near enough to the line of public travel to interfere with or incommode travelers, are not to be deemed defects. 3. The injury complained of arose from the fright of a horse, occasioned by several blocks of split granite, which were lying outside the traveled path. *Held*, that no recovery could be had. "The defendant had the right to use the highway for the removal of these stones to where they were needed. If the plaintiff's horse had taken fright while in the process of their removal, the town would not have been liable. Davis v. Bangor, 42 Maine, 522. Still less should the town be liable while they are at rest, and outside the traveled path. Neither are they articles which could be expected to frighten a well trained horse, and against which the town was to be on its guard. In Card v. Ellsworth, 65 Maine, 547, the object of fright was, *per se*, a defect in the road. In Nichols v. Athens, 66 Maine, 402, the body of a common riding wagon, left outside of the traveled road, by which a horse was frightened, was held not to be such an incumbrance or defect as would render the town liable for a defective highway. 'There is no doubt,' observes Peters, J., 'that a town would be liable in damages in many cases where horses become frightened by objects within the traveled way, when the same objects could not reasonably be regarded as constituting a defective road if situated outside the traveled way.' In Perkins v. Fayette, 68 Maine, 152, an instruction that towns were not required to render a road passably for the entire width of the whole located limits, and that the duty of the town was accomplished by making a sufficient width of the road in a smooth condition so that it would be safe and convenient for travelers, was held correct. It was there held that the town had the right, in making and repairing roads, to remove stones and stumps on the sides of the way, and leave obstructions there, provided the same were situated so far from the traveled path that persons passing over the road with teams might pass without danger of collision. In Rounds v. Corporation of Stratford, 25 U. C. C. P. 123, it was held that the existence of a broken-down wagon, with a bright red board sticking to it, on the side of a highway and partly in the ditch, where it had been hauled by the owner, some eight or ten feet from the traveled path, leaving plenty of room to pass, and remaining there for ten days, did not constitute evidence of actionable negligence on the part of the corporation. 'It is not pretended,' observes Hagarty, C. J., 'that it produced any ill effect beyond frightening of the horse, * * It was not that it encroached on the road, or narrowed the road way, but that it presented an appearance likely to cause a horse to shy. * * I can not for a moment understand how the presence of a broken-down country wagon on the side of the road, in no way interfering with the fullest privilege of passing or repassing, can, in and of itself, give a cause of action to any person. It must be rested wholly on the wagon being an object likely to frighten horses. * * If liable here, they would be liable for the most trivial matters; far more startling objects are to be seen in and along the sides of streets. Must a corporation insist, at its peril, on the removal of everything as likely to startle as an old country wagon with cross pin or board standing upon it, hauled completely out the traveled way?' So in Bartlett v. Kittery, 68 Maine, 358, it was held that a thing rightfully in the highway might constitute a defect by remaining there an unreasonable time; but to hold the [inhabitants liable, they must not only know the thing is there, but that it is there under circumstances which constitute a defect. In the case before us, the stones were procured for the purpose of repairing the highway, and had not been at the place where they were left but a few hours. They in no way obstructed the public travel. The town was in no fault for their being on the side of the road. Ample space was left for the public travel without coming in contact with the stones. According to the weight of authority the defendants are not legally responsible for the accident and consequent injury." Opinion by APPLETON, C. J.—*Farrell v. Oldtown.*

SUPREME COURT OF MICHIGAN.

June Term, 1879.

INSURANCE — MORTGAGEE MAY GIVE NOTICE OF LOSS—ASSIGNMENT OF CAUSE OF ACTION—INVALID INCUMBRANCE.—An insurance policy provided that "in case of loss the assured shall give immediate notice, stating the number of the policy and the name of the agent." The policy was made payable in the case of loss to one Jagger, as his mortgage interest should appear. One Dobbins also had a mortgage on the premises. After the fire the owner assigned to him all his interest in the policy above Jagger's claims. The owner gave no notice to the company. *Held*, 1. That notice of loss given by the mortgagees was sufficient within the letter and spirit of the policy. The first mortgagee was one of the parties "assured," and a notice given by him would come to the benefit of all other interested parties. Such notice need not be in writing. 2. That plaintiff, to whom the two mortgagees had assigned, could bring the action in its own name, there being no splitting of claims as all had passed to plaintiff. 3. That the mortgage to Dobbins being invalid, because given upon a homestead and not joined in by the mortgagor's wife, would not vitiate a provision in the policy against incumbrances. Only a valid incumbrance was referred to, and the intentions of the parties are immaterial. Opinion by MARSTON, J.—*Watertown Fire Ins. Co. v. Grover & Baker Sewing Machine Co.*

ASSIGNOR OF CHOSE IN ACTION NOT LIABLE FOR ILLEGAL AND UNAUTHORIZED ACTS OF ASSIGNEE IN HIS NAME.—Defendant having a claim against plaintiff for moneys received as its agent, an insurance company which had guaranteed his responsibility paid the loss, became subrogated to defendant's rights, obtained from it permission to use its name in collecting the claim, and had plaintiff arrested upon a *capias* issued in defendant's name. There was no evidence that the railway company ever had any knowledge of the proceedings. The suit was instituted and prosecuted by the insurance company for its own benefit. Plaintiff being discharged by this court on *habeas corpus* on the ground that the affidavit did not authorize a *capias*, sues for the illegal arrest and imprisonment. *Held*, that the authority given the insurance company to use defendant's name only extended to the use in any proper and legitimate manner given by law for the collection of the claim. An assignor of a chose in action is not responsible for the

the assignee's unauthorized and illegal acts done in the assignor's name in attempting to collect the claim. Nor does the fact that the affidavit for the *capias* was made by the traveling agent of the railway company create such a liability; for, in making it he was not act-acting for or in the interests of that company. Opinion by MARSTON, J.—*Park v. Toledo, etc. R. Co.*

RES ADJUDICATA—OPERATION OF COURT RULE—EFFECT OF FAILURE TO DENY EXECUTION OF LEASE—LEASE DISPUTABLE IN SECOND SUIT.—An action was brought for rents alleged to have accrued between October 15, 1875, and April 9, 1877, on a lease to plaintiff from defendants for three years from date. The general issue was pleaded, but there was no denial under oath of the execution of the lease, and therefore, under circuit court rule 79, defendants were precluded from disputing the execution on the trial, and could only make such defense as assumed that they had made the lease. Fish v. Hale, 4 Mich. 506. Plaintiff recovered, and now brings another suit on the same lease for rents claimed to have accrued between July, 1877, and April, 1878. The plea was now accompanied with an affidavit denying the execution of the lease, and to prove the execution plaintiff offered, and there were received against objection, the files, the verdict and judgment, in the former case. *Held*, that by the former suit the execution of the lease was not conclusively established for the purposes of any subsequent suit to recover rent claimed to have accrued under it. There are two matters in respect to which an adjudication once made may be conclusive: first, the subject-matter involved in the decision; and second, the point of fact or of law, or of both necessarily adjudicated in determining the issue upon the subject-matter in litigation. As to the subject-matter, it is of no importance when the question comes up again collaterally, whether the suit was contested or was suffered to go by default. The subject-matter of the first suit between these parties was the right to recover certain rents alleged to have accrued upon the lease prior to April, 1877. It may be necessary to distinguish between that subject-matter of the former suit, namely, the rent claimed, and the point involved in the right to them, namely, the execution and delivery of the lease. Upon this last no issue was made in the former suit, which left it wholly outside the issue made and actually passed upon, and hence that court could not have considered it a point in that suit open to controversy. The proposition that public policy will not suffer the withholding of a defense with a view to further litigation, when a single suit might determine the whole controversy, is not applicable to a case where the subject-matter of the second suit is different. See Cromwell v. County of Sac, 4 Cent. L. J. 416; Howlett v. Tarte, 10 C. B. N. S. 813; Kelsey v. Ward, 38 N. Y. 83; Dickinson v. Hayes, 31 Conn. 417. Inconsistent with these views and with principle is Collins v. Bennett, 46 N. Y. 491. Opinion by COOLEY, J.—*Jacobson v. Miller.*

INCORPORATION OF SOCIETIES—INVALID STATUTE—UNION OF SOCIETY AND CHURCH—MEMBERSHIP—ARTICLES OF ASSOCIATION—BY-LAWS—USURPATION OF FRANCHISES.—An information is filed for alleged abuse of corporate franchises in imposing under certain amended by-laws conditions which, among other provisions, subjected the interests of the society to the control, in certain respects, of a spiritual director appointed by the Roman Catholic bishop of Detroit, and confined membership to Roman Catholics. The plea admits the amendments, and claims that all the members are Roman Catholics but relator, and avers that he has been by resolution exempted from the penalties of the by-laws. Section 3 of the act of 1865, entitled "An act to authorize the formation of corporations for literary and scientific purposes," in prescribing what should be set forth by each society in its articles, included, "*Third*. The objects for which it is organized, which shall be only for the promotion of literary and scientific pursuits." L. 1865, pp. 725-6. In 1867, an act was passed to amend § 2 of the act of 1865 "so as to include missionary and other scientific purposes." 1 L. 1867, p. 21. This association was organized under these statutes in 1865, under articles containing, in addition to the business clauses, some provisions indicating the purposes of the society. Article 3 provided that the objects should be to encourage total abstinence from intoxicating drinks, to provide relief in case of sickness or accident, to promote literary pursuits among the members, to which use a library should be procured and maintained, etc. Article 5 declared that every person elected might be a member on paying the dues and taking the abstinence pledge therein required, under certain restrictions as to age and health. In 1878, the by-laws were altered so as to provide for the appointment by the Roman Catholic bishop of a spiritual director. The qualification of membership was added, that they should be Irish or of Irish parentage, and Roman Catholics. Masses for the repose of the souls of deceased members were provided for. All purchases of reading matter were made subject to the approval of the spiritual director. *Held*, that the original articles of association were drawn upon an erroneous theory of the statute, which does not provide for such matters at all. The act of 1867 is invalid, as the constitution, art. 4, § 20, prescribes that "no law shall embrace more than one object, which shall be expressed in its title;" the statute of 1865 is expressly confined by its title to "literary and scientific purposes." Our laws distinguish between religious purposes and those of general benevolence, as also between benevolent purposes and those of different character; and the new act could only have the effect of bringing in an amendment outside of the purpose indicated by the title of the former act and inconsistent with section 3 thereof, which conforms to the title and is neither amended or repealed. None of the purposes, not purely literary, set forth in the articles of association can be upheld. 2. It is questionable how far an incorporation can be regarded as binding when the principal part of the agreement under which it was passed can not be upheld. But, assuming that the association may be regarded as a corporate union of the members for the purpose of maintaining a library and literary exercises, the validity of the new regulations is still questionable. Without an amendment of the articles, no restrictions except those imposed by them can lawfully be imposed on membership. Nor, under the statute, can any regulation be lawful which subjects the interest of the society to any interference outside of its board of directors. 3. All corporate by-laws must stand on their own validity, and not on any dispensation granted to members. They can not be compelled to receive as matter of grace anything which is matter of right; nor should there be personal exemptions of a general nature from any valid regulations that bind the mass of corporators. 4. No act for creating corporations can ever be extended by construction to cases not reasonably covered by its terms, even if no statute whatever applies to the desired objects of incorporation. 5. The changes in the by-laws are violations of corporate duty, and all the powers set forth in the articles beyond those relating to literary, scientific and library purposes are usurpations. Judgment of ouster from the illegal franchises, with nominal fine of one dollar and costs of this court. *People ex rel. Stewart v. Young Men's Father Matthew Society.*—Opinion by CAMPBELL, C. J.

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, June 21, 1879.]

PRACTICE—CONTESTED ELECTION — DIRECT APPEAL TO THE SUPREME COURT FROM COUNTY COURT.—An election was held in the town of Spring Grove on the 3d of April, 1877, at which Gilmore and Gulaw were each voted for as candidates for the office of supervisor of the town. On counting the vote at the close of the election each candidate was found to have received one hundred and thirty-nine votes. Lots were thereupon drawn and Gilmore drew the successful lot and entered upon the duties of the office. Webster contested the election, and filed a written statement in the county court of that county, and after answer and replication the cause was heard and judgment rendered in favor of appellee. From that judgment Webster appeals to this court. Appellee claims that no appeal lies to the supreme court from a county court. WALKER, J., says: "An appeal is given directly to this court by the 123d section of the election law. (See Rev. Stats. 1874, p. 466.) By that act jurisdiction is conferred on the county court to hear and adjudicate in contested elections for county officers, and the appeal is given to this court in the same manner and upon like conditions as is provided by law for taking appeals in cases in chancery from the circuit courts. The eighth section of the act creating appellate courts allows appeals from and writs of error to the circuit courts or the Supreme Court of Cook county. The 88th section of the practice act only refers to the same courts in connection with appeals to or writs of error from the appellate courts. Thus, it is seen that an appeal from or writ of error to a county court is not given by the acts creating the appellate courts and regulating the practice therein. And in the absence of an enactment authorizing writs of error from and appeals to, these courts can not take jurisdiction. And it follows that the appeal in this case did not lie to the appellate court. The appeal was therefore properly brought to this court." Affirmed.— *Webster v. Gilmore.*

CONTRACT—CONSIDERATION—PROMISE BY COUNTY SUPERVISORS OF BOUNTIES FOR ENLISTMENT —PROMISE MADE AFTER ENLISTMENT.—This is an action brought by appellant to recover a bounty of one hundred dollars claimed to be due from the county of De Kalb to appellant, under resolutions passed by the board of supervisors. To the declaration defendant filed a demurrer, which the court sustained, and rendered judgment for defendant, to reverse which plaintiff brings the record to this court. As appears by the declaration, plaintiff enlisted in the military service of the United States on the 16th of September, 1861, for a term of three years. The resolution of the board relied on to create the liability was first adopted on the 14th of December, 1863, by which a bounty of one hundred dollars was to be paid to each resident of De Kalb county "who may enlist," etc. On the 13th day of May, 1864, the board adopted a resolution that the terms of the resolution passed on the 16th of December, 1863, in regard to the payment of bounties, be extended to all who have enlisted in the service of the United States for the term of three years prior to this date. WALKER, J., says: "If appellant volunteered at that time without any resolution promising him a bounty, there was not the slightest duty or obligation legal or moral on the part of the county to pay him any bounty whatever, and even if this resolution (the first) in terms had embraced him it would have created no indebtedness, because there was no consideration to support the promise, and for the further reason that the board had no legal authority to make such promise or an appropriation to pay it. We are aware that decisions may be found which seem to be adverse to this conclusion, but we do not regard them of binding authority, nor are we inclined to follow them. The board has no power to appropriate money to individuals, however meritorious, as a donation, or for any purpose not authorized by law." Affirmed.—*Greenwood v. County of De Kalb.*

PRACTICE — AMENDMENT AFTER OPENING OF CASE — DISMISSAL AS TO ONE OF THE PLAINTIFFS —VARIANCE.—This is an action on the case commenced by Walter Todd and Chas. Todd, who sue as partners, against the Chicago, etc. R. Co. for negligence resulting in the burning of a flouring mill and its contents in the town of La Salle. It is alleged in the declaration that plaintiffs as partners were the lessees of the mill. The cause was submitted to a jury, and the plaintiff, Chas. Todd, testified that he and his father, Walter Todd, his co-plaintiff, were in partnership, and in possession of the mill. After all the evidence for plaintiff and defendant was given to the jury, Chas. Todd, being then recalled to rebut evidence given on behalf of the defendant, testified that his mother, Emily Todd, and not his father, Walter Todd, was in partnership with him in the mill. Motion was then made by counsel for plaintiff under the 24th section of the Practice act to substitute the name of Emily Todd in the place of Walter Todd, which, against the objection of defendant, the court allowed. The defendant then asked for a continuance, which the court being about to grant, the plaintiff's counsel asked leave to discontinue the suit as to Walter Todd, which the court allowed, and also allowed plaintiff to proceed with the trial of the cause in the name of Chas. Todd as said plaintiff, the motion to substitute Emily as co-plaintiff being abandoned. To all these rulings of the court the defendant excepted and comes here on appeal. SCHOLFIELD, J., says: "It is conceded by counsel for appellee that had the suit in the first instance been brought in the name of Chas. Todd alone, the non-joinder of Emily might have been pleaded in abatement, and such has been the ruling of this court. 14 Ill. 22; 17 Ill. 302. It was a matter of substantial right to the appellant to have the cause of action adjudicated in a single suit. But by the ruling here it was denied that privilege. It was against its protest required to proceed with the trial after the suit was dismissed as to one of the original plaintiffs. The amendments allowed to be made by § 24 of the Practice act are in furtherance of justice and the rights of the parties and not in denial of such rights. There was also a variance after the amendment which in itself was fatal. 37 Eng. Law & Eq. 523; 4 Ohio (N. S.), 542; 8 Allen, 75." Reversed. DICKEY, J., dissenting,—*Chicago, etc. R. Co. v. Todd.*

NEGLIGENCE — GETTING OFF OF STREET CAR— DUTY OF PASSENGER TO SEE THAT CAR IS STOPPED FOR THAT PURPOSE—RELEASE OF CAUSE OF ACTION—INSANITY—PRESUMPTION.—This is an action brought to recover damages for the negligence of a street railroad company by which plaintiff was injured. It appears that plaintiff was on one of defendant's cars, and that when the same stopped at the corner of State and Randolph streets she attempted to get out, but was thrown down in consequence of the car being suddenly started. Two pleas were offered: 1st. Not guilty; 2d. Release made by plaintiff to defendant. The verdict was for plaintiff. Defendant appeals. An instruction under the first plea was given to the general effect that "if the defendant stopped said car for the purpose of permitting the plaintiff to alight, and that when the plaintiff, if using due care, was in the act of stepping off, and that defendant's agent started said car before plaintiff had a reasonable time to alight," etc. Under the second plea, an instruction

was given to the effect that "the burden of proof is upon the defendant to show that the alleged written release of plaintiff offered in evidence by the defendant was the conscious act and deed of said plaintiff, or executed in compliance with a previous agreement made when she was mentally capable of making and understanding it." SCHOLFIELD, J., says: "This instruction (first) was calculated to mislead the jury and should not have been given. It assumes that the car was stopped, upon notice, for the purpose of letting passengers off. There is no proof that warrants such an assumption. It is not shown how or why the car happened to be stopped at that place. While this circumstance should not be held to exonerate the defendant from the exercise of the care with which it is properly chargeable, yet the facts are such as to show that the defendant should not be required to anticipate that persons would be desirous of getting off the cars at any stoppage that they might make. And, therefore, unless it should appear that the driver stopped the car for the purpose of letting passengers get off, or he knew that persons were actually getting off, the company is not chargeable with negligence. * * * It is contended that the release was signed by plaintiff while her mind was in a state of unconsciousness. The instruction (second) was clearly erroneous. In Lilly v. Waggoner, 27 Ill. 397, the rule was thus laid down: 'The legal presumption is that all persons of mature age are of sane memory. But after inquest found, the presumption is reversed, until it is rebutted by evidence that he has become sane. When the transaction complained of occurred before the inquest is had, the proof of insanity devolves upon the party alleging it, but it is otherwise if it took place afterwards.' 23 Ill. 283; 18 Ill. 282. Here it devolved upon the plaintiff to show that the release was obtained when her mind was impaired—not upon the defendant to show that her mind was not impaired when it was obtained." Reversed. *Chicago (West Div.) R. Co. v. Mills.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July, 1879.

LEASE — RENT PROVABLE AGAINST INSOLVENT ESTATE—SURRENDER.—1. Where a lessee has died and his estate has been declared insolvent by the probate court, and commissioners have been duly appointed, the lessor is entitled to prove for rent which became payable by the terms of the lease before or after the death of the lessee, up to the time that the claim is presented to the commissioners, but is not entitled to prove any claim for or on account of rent payable in the future. 2. If the administrator in such case has surrendered the lease, and its acceptance by the lessor has been absolute, and not qualified by any reservation of or agreement for a right to sue the administrator or prove against the estate, in case of a loss by being compelled to let the premises at a reduced rent, then such surrender terminates the lease, and all liability upon the covenants thereof. Randall v. Rich, 11 Mass. 494; Amory v. Kannoffsky, 117 Mass. 351. Only the amount payable up to the time of such surrender can be proved, deduction being made for any sums received by the lessor for use and occupation by the administrator. Opinion by GRAY, C. J.—*Deane v. Caldwell.*

WILL—CHARITABLE BEQUEST —INTERPLEADER.—1. The will of a testator directed that the income of a certain fund accumulated under its provisions "shall be paid annually by the trustees acting under the will to such person or persons as shall from time to time be appointed by the judge of probate for the time being in the district of Norwich, in the State of Connecticut, to take, receive and distribute the same among the poor, meritorious widows, living and belonging within the limits of the first ecclesiastical society of the town of Norwich and district aforesaid," and further provided that if from any cause said object could not be accomplished, or the income was not applied conformably to the provisions of the will, the fund should lapse and become part of the residue of the estate. The trustees entered upon their duties in 1852, and in 1872 the widows' fund having accumulated to the amount required by the will, they made application in Connecticut to the judge of probate for the district named for the appointment of a suitable person to receive and distribute the income thereof, according to the provisions of the will. The then judge of probate declined, alleging want of jurisdiction. In 1877, however, after this bill for instructions was filed, the present judge of probate for that district appointed the defendant, Burr, a trustee under the provisions in question; and in the following year the legislature of Connecticut confirmed the appointment, and gave express power to the judge of probate in the premises. *Held*, that the bequest was valid; that the delay in appointment of an almoner would not defeat it; and that there had been no misapplication of the trust fund which would work a forfeiture. 2. The question whether there has been an abuse of a trust is one in which the trustees have a direct personal interest, and which can not be tried and settled in a bill in the nature of a bill of interpleader brought by them for the purpose of obtaining the advice and protection of the court in the execution of their trust. Opinion by COLT, J.—*Sohier v. Burr.*

BOOK NOTICES.

NEW EDITIONS OF TWO GREAT WORKS.

A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES. By FRANCIS WHARTON, LL. D. Author of Treatises on Conflict of Laws, Medical Jurisprudence, Negligence, Agency and Criminal Law. In two volumes. Second edition. Philadelphia: Kay & Bro. 1879.

A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY. By LEONARD A. JONES. Author of a Treatise on Railroad Securities. In two volumes. Second edition. Boston: Houghton, Osgood & Co. 1879.

In the case of the first of these books only two years, and in that of the second but eighteen months, have elapsed since the first edition appeared. The favor which they have met with at the hands of the profession is thus sufficiently shown. Both were then reviewed in this JOURNAL, and we have felt curious to look back and see what we had to say of them at that time.

Of Mr. Jones' work we then said: "This is, in some respects, the most elaborate and comprehensive work on the subject of Mortgages of Real Property that has yet appeared. It is strictly limited to mortgages of realty, and consists of forty chapters and 1,927 sections. Eight thousand cases, mostly American, are cited about 14,000 times under different topics. A synopsis of the more material provisions of the statutes of the several States is given. The doctrine pertaining to mortgages at common law and in courts of

equity, aside from statutory regulation, are stated, and in connection therewith the statutory modifications. A very considerable space is properly devoted to the foreclosure of mortgages, and, as incident to this, the appointment of receivers, and the decree, sale, and application of the proceeds. * * * It will not fail to find favor with the profession, and to secure their approving judgment. From an American stand-point it would seem to be a most comprehensive and thoroughly practical work, and one not likely to disappoint the expectations which our high estimate of it may raise." The second edition has been revised throughout; additions to the text and citations have been made in every division of the subject—in all one hndred and fifty pages—and over a thousand new cases have been added. Mr. Jones' treatise has since its publication received so many testimonials to its worth, that anything more at this time is unnecessary. It continues to merit the good opinion which was expressed eighteen months ago, by the eminent jurist who wrote the review from which we have quoted.

Two years ago we spoke of Dr. Wharton's Treatise on Evidence in these words: "The present volumes are designed to meet these changes (statutory changes in the law of evidence), consequently they are indicated in a striking manner. Familiar chapters in the old books—old only as regarding the progress made in the law—are looked for in vain. They have passed quite away and forever. The space which they occupied is given up to decisions that show forth the law as it stands at this time. Any one who knows the value of the adjudications of late years on questions of evidence presented by the new laws, will readily perceive the value of the present work, which not only disencumbers the law of a large amount of useless matter, and gives place to new matter, but illumines the whole subject with lights from what may be considered as a new philosophy at present pervading alike the statutes and the decisions. The chapters on the nature of proof, relevancy and presumption, must be regarded as being contributions to legal science of unusual value." In the second edition Dr. Wharton has added much new matter, and the new adjudications have been cited. From all the works on Evidence which are on the market today, we would unhesitatingly select this one as being first in practical usefulness, and second to none in learning.

NOTES.

The type writer must now be added to those "labor-saving" productions of which we have so often spoken—the index and the digest. Just as the accumulation of precedents has made the digest a necessity, so the growth of litigation and the increase of appellate jurisdiction has caused the courts of last resort in most of the States to order by rule that the records brought up and the briefs filed shall be in print. Lawyers are not as a class good penmen, and the judges who are still compelled to read their writing by the yard would be entitled to much sympathy were it generally believed that they read everything that is submitted to them in this manner. A lawyer whose brief is printed is a little more likely to have his arguments followed than the lawyer whose brief is written; and to say this is to cast no reflection on the judge whose duty it was to consider them. The great expense in printing briefs is at an end when a machine can be obtained with which a brief may be written and printed at the same time. In addition to this, the type writer relieves the body—the stooping position of the writer at a desk or table being changed to the upright position of one sitting at a piano, and saves the sight—the eye not being required to follow the paper on which the printing is done. Manifold copies, to the number of twelve or more, may be made at the same time. The labor of a large correspondence becomes less of a drudgery when the writing is done in this manner.

In an action of Betts v. Doughty, tried last week before Sir James Hannen and a special jury, a new head of equity was "evolved;" and, although no definite decision as to its validity was rendered by reason of the dispute between the parties being settled, yet the matter amply deserves the notice of the profession. From the facts proved in the course of the plaintiffs' case, it appeared that Miss Doughty, who died last year, aged seventy-nine, had made a will in 1853, by which she directed her real and personal estate to be sold, and the moneys realized from the sale to be divided equally between her brothers (two in number) and her sister. Her brothers and her sister predeceased her, all leaving issue. The children of the sister—namely, Major Betts and Miss Betts—propounded the will and were plaintiffs in the action; the eldest son of the eldest brother was defendant in the action, and as heir-at-law opposed the will on the ground of the incapacity of the testatrix; and the children of the other brother appeared as intervenors in the action. In the course of the plaintiffs' case, counsel for defendant cross-examined the witnesses who gave evidence in support of the will not only for the purpose of proving the plea of the incapacity of the testatrix, but also for the purpose of showing that twenty years after the will had been made, the testatrix was desirous of executing a new will depriving the plaintiffs in the action of all benefit under her will of 1853, and transferring that benefit to the defendant, his brother, and the intervenors, and that she was prevented by the threats of the plaintiffs from executing this further will. Enough was elicited in cross-examination to make out a *prima facie* case to this effect; and, therefore, at the close of the case for the plaintiffs, counsel for the defendant applied to the judge to be allowed to amend the statement of defense, by adding a paragraph to the effect that the testatrix was prevented, by the threats of the plaintiffs, from executing the draft will excluding the plaintiffs from all interest under the will of 1853; and, also, by adding a claim that the plaintiffs should be declared to be trustees of the share bequeathed to them by the will of 1853, for the benefit of the defendant, his brother, and the intervenors. In spite of the opposition of the plaintiffs' counsel, Sir James Hannen allowed the statement of defense to be so amended; and his lordship also allowed the intervenors to put in the same pleading, and ask for a like declaration. However, upon his lordship's suggestion, the parties wisely compromised the dispute, and the will of 1853 was pronounced for upon terms. We believe that no case of this kind is to be found in the whole history of equity jurisprudence, and that there is, therefore, no precedent for the plea. But, if the plea is bad, then it would seem to follow that a party who knew that a testator had made a will in his favor might, by actual force, prevent the testator from changing the disposition of property, and so take advantage of his own wrongful act. The novelty of the equity set up is sufficient to enforce its claim to legal attention, as, although no case of the kind has occurred in the past, the future may bring forth fresh instances. It is worthy of observation that, before the Judicature Act, the parties could not have raised such an issue in the Court of Probate, but would have been driven to file a bill in chancery to assert the claim.—*Law Journal.*